

As a result of this medical data Mr. Gearhart offered Ms. Perando a job transfer to the surface laboratory in September 1985. Gearhart then knew that she was unable to work underground because of the hazard of coal dust exposure to her health. It is not disputed that Ms. Perando accepted a transfer to the surface laboratory and began working at that job on September 27, 1985, at a reduced rate of pay.

While it is apparent that Ms. Perando never "refused" to work underground in the traditional sense, she knew, based on the medical evidence, that she should no longer work underground because of the hazard presented to her from coal dust exposure and Mettiki knew this too. Thus her medically substantiated inability to work underground was the functional equivalent of a work refusal. Since Ms. Perando had been apprised by her physicians of her medical condition and of the "disabling" consequences of continued underground work, her work refusal was also based upon a good faith and reasonable belief in the hazard.

This refusal was also communicated to the mine operator by the doctors' reports to Personnel Manager, Thomas Gearhart. Moreover in recognition of the health hazard presented to Ms. Perando by underground work and in apparent recognition of its obligation to address this danger, Mettiki offered her the outside job in the laboratory. See Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983).

By reducing Perando's pay in the laboratory however (apparently from \$520.20 to \$383.20 per week), I find that Mettiki did in fact unlawfully discriminate against her because of her work refusal.^{2/} Under the circumstances I find that Ms. Perando is entitled to damages amounting to the pay differential between her underground job and her laboratory job for the period of her employment in the laboratory.

Ms. Perando next claims that she was discriminatorily charged with unexcused absences because she filed an application for Worker's Compensation. She seeks to have all such unexcused absences expunged from her personnel file. The record shows that she had received a copy of the Mettiki employee handbook in August 1984 which included a requirement for telephoning the mine office at least one half hour before the employee's work shift when reporting in sick. Perando knew that she was therefore required to call the office by 6:30 a.m. on the days that she was reporting sick and

^{2/} The fact that Ms. Perando may have failed to formally protest this pay reduction to Mettiki officials before filing her claim of discrimination under the Act would not constitute any consent to, or waiver of, such discrimination.